Freddie L. Doss
NAME
H-74204
PRISON NUMBER

CURRENT ADDRESS OR PLACE OF CONFINEMENT
P.O. BOX 3461 3A04-144
CORCORAN, CA 93212
CITY, STATE, ZIP CODE

2254 ✓ 1983
FILING FEE PAID
Yes ___ No ✓
IFP MOTION FILED
Yes ___ No ✓
COPIES SENT TO
Court ✓ ProSe

FILED
2007 OCT 17 PM 3:32
CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY RM DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FREDDIE L. DOSS,
(FULL NAME OF PETITIONER)
PETITIONER

v.

M. EVANS (WARDEN),
(NAME OF WARDEN, SUPERINTENDENT, JAILOR, OR AUTHORIZED PERSON HAVING CUSTODY OF PETITIONER [E.G., DIRECTOR OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS])
RESPONDENT

and

___________,
The Attorney General of the State of California, Additional Respondent.

Civil No. '07 CV 2011 DMS RBB
(TO BE FILLED IN BY CLERK OF U.S. DISTRICT COURT)

PETITION FOR WRIT OF HABEAS CORPUS

UNDER 28 U.S.C. § 2254
BY A PERSON IN STATE CUSTODY

1. Name and location of the court that entered the judgment of conviction under attack: SUPERIOR COURT - LOS ANGELES COUNTY - CALIFORNIA
2. Date of judgment of conviction: JAN 1993
3. Trial court case number of the judgment of conviction being challenged: UNKNOWN AT THIS TIME.
4. Length of sentence: 29 TO LIFE PLUSE LIFE

5. Sentence start date and projected release date: AUGUST 1990; 2018

6. Offense(s) for which you were convicted or pleaded guilty (all counts): COUNT (1) PEN. CODE, 187; CON. (2) 209; COUNT (3)

7. What was your plea? (CHECK ONE)
   (a) Not guilty ☑
   (b) Guilty ☐
   (c) Nolo contendere ☐

8. If you pleaded not guilty, what kind of trial did you have? (CHECK ONE)
   (a) Jury ☑
   (b) Judge only ☐

9. Did you testify at the trial?
   ☐ Yes ☑ No

DIRECT APPEAL

10. Did you appeal from the judgment of conviction in the California Court of Appeal?
    ☑ Yes ☐ No

11. If you appealed in the California Court of Appeal, answer the following:
    (a) Result: CONVICTION UPHELD
    (b) Date of result, case number and citation, if known: JAN. 11, 1996 CASE # B074209
    (c) Grounds raised on direct appeal: PLEASE SEE EXHIBIT A PAGE 2

12. If you sought further direct review of the decision on appeal by the California Supreme Court (e.g., a Petition for Review), please answer the following:
    (a) Result: AFFIRMED
    (b) Date of result, case number and citation, if known:
    (c) Grounds raised: SAME GROUNDS RAISED ON DIRECT APPEAL.

13. If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to that petition:

(a) Result: ______

(b) Date of result, case number and citation, if known: ______

(c) Grounds raised: ______

COLLATERAL REVIEW IN STATE COURT

14. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Superior Court?
☒ Yes ☐ No

15. If your answer to #15 was "Yes," give the following information:

(a) California Superior Court Case Number: BH003847

(b) Nature of proceeding: Habeas Corpus

(c) Grounds raised: Trial Court violated the petitioner's Sixth Amendment Right to confrontation, pursuant to Crawford vs Washington (2004).

(d) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☒ No

(e) Result: ______

(f) Date of result: ______

16. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Court of Appeal?
☒ Yes ☐ No

17. If your answer to #17 was "Yes," give the following information:

(a) California Court of Appeal Case Number: ?

(b) Nature of proceeding: Habeas Corpus

(c) Grounds raised: Sixth Amendment - Confrontation Clause.

Essentially the same grounds raised in the Superior Court.

(d) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☒ No

(e) Result:

(f) Date of result:

18. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Supreme Court?
☒ Yes ☐ No

19. If your answer to #19 was "Yes," give the following information:

(a) California Supreme Court Case Number: S146442

(b) Nature of proceeding: Habeas Corpus

(c) Grounds raised: Trial Court violated petitioner's Sixth Amendment Right to confrontation, pursuant to Crawford vs Washington (2004).

(d) Did you receive an evidentiary hearing on your petition, application or motion?

☐ Yes ☒ No

(e) Result: Denied

(f) Date of result: March 21, 2007

20. If you did *not* file a petition, application or motion (e.g., a Petition for Review or a Petition for Writ of Habeas Corpus) with the California Supreme Court, containing the grounds raised in this federal Petition, explain briefly why you did not:

COLLATERAL REVIEW IN FEDERAL COURT

21. Is this your first federal petition for writ of habeas corpus challenging this conviction?

☒ Yes ☐ No (IF "YES" SKIP TO #11)

(a) If no, in what federal court was the prior action filed? ______

(i) What was the prior case number? ______

(ii) Was the prior action (CHECK ONE):

☐ Denied on the merits?

☐ Dismissed for procedural reasons?

(iii) Date of decision: ______

(b) Were any of the issues in this current petition also raised in the prior federal petition?

☐ Yes ☐ No

(c) If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this second or successive petition?

☐ Yes ☐ No

CAUTION:

- Exhaustion of State Court Remedies: In order to proceed in federal court you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. This means that even if you have exhausted some grounds by raising them before the California Supreme Court, you must first present *all* other grounds to the California Supreme Court before raising them in your federal Petition.

- Single Petition: If you fail to set forth all grounds in this Petition challenging a specific judgment, you may be barred from presenting additional grounds challenging the same judgment at a later date.

- Factual Specificity: You must state facts, not conclusions, in support of your grounds. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do. A rule of thumb to follow is — state who did exactly what to violate your federal constitutional rights at what time or place.

GROUNDS FOR RELIEF

22. State *concisely* every ground on which you claim that you are being held in violation of the constitution, law or treaties of the United States. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and/or facts supporting each ground.

(a) **GROUND ONE**: The Trial Court violated the petitioner's Sixth Amendment Right to confrontation, pursuant to Crawford vs Washington (2004).

Supporting FACTS (state *briefly* without citing cases or law) During the petitioner's trial, the two key witnesses (Lucille and Kevin Thomas) testified in limine that they had no memory whatsoever of the incident of which the petitioner was on trial; nor did they have any recollection of their previous preliminary hearing testimony or the statements made to the police, both of which were incriminating, and used at trial as evidence before the jury. Petitioner was unable to confront both witnesses, because they were both dismissed after the hearing in limine, and the evidence was presented by the prosecutors, and testified to by the police investigators. The petitioner was subsequently covicted and sentenced to life. (See: Exhibit "A": Court of Appeals opinion, at pp. 11-12).

GROUND ONE

ARGUMENT

Clearly established U.S. Supreme Court law pertaining to confrontation of witnesses at trial was determined in the case of Crawford vs Washington,(2004) 541 U.S. 36; 124 S.Ct. 158; In Crawford, the Court held that out-of-Court statements that are testimonial, as well as preliminary hearing testimony must

Did you raise GROUND ONE in the California Supreme Court?

☒ Yes ☐ No.

GROUND ONE
ARGUMENT ONE, Cont.

be excluded from evidence at trial under the confrontation clause, unless the witness is unavailable and the defendant had a prior opportunity to cross examine the witness. Furthermore, even where the defendant had such an opportunity to cross examine, the high Court excluded the testimony where the Government had not established the unavailability of the witness. See: Barber vs Page, 390 U.S. 719, 722-725 (1968). Cf. Motes vs United States, 178 U.S. 458, 470-471 (1900).

In the instant case, the trial Court failed to establish that the witnesses were unavailable. This issue was raised by the petitioner in conjunction with his claim that his Right to confrontation and cross-examination was violated. In its response, the Court of Appeals declared that the witnesses did not refuse to testify, as they testified in limine, pursuant to evidence code section 402. (See: Exhibit A, at pp. 12-13.) But that they instead claimed to have no recolection of their preliminary hearing testimonies, or the statements that they made to police investigators. Thus, because the witnesses claimed no recollection, the Court admitted the witnesses prior preliminary hearing testimony and statements to the police, through investigators, and presented it to the jury. The witnesses were then dismissed. The investigators were allowed to testify to the evidence admitted. This was a violation of the petitioner's Right to confront and cross-examine. The witnesses were not deemed unavailable by the Court. Therefore, they should have been compelled to take the stand before the jury. Instead, the Court allowed hearsay and out-of-Court statements.

GROUND ONE

ARGUMENT ONE, Cont.

Hearsay is generally excluded because the out-of-Court declarant is not under oath and cannot be cross examined to test perception, memory, clarity of expression, and veracity, and because the jury (trier of facts) is unable to observe the declarant's demeanor. People vs Cudjo, 863 P.2d. 635; 25 Cal. Rptr. 2d. 390, as modified on denial of rehearing, Cert. Denied: Cudjo vs California, 115 S.Ct. 147; 513 U.S. 850; 130 L.Ed. 2d. 87 ; Habeas Corpus denied: In Re Cudjo, 977 P.2d. 66; 85 Cal Rptr. 2d. 436; 20 Cal. 4th 673, rehearing denied.

The test of hearsay evidence is found in Ohio vs Roberts, 448 U.S. 56 (1980). Crawford vs Washington deviates from Ohio vs Roberts. "Roberts conditions the admissibility of all hearsay evidence on whether it falls under a firmly rooted hearsay exception or bears particularized guarantees of trust worthiness." (Crawford, 124 S.Ct. at 1369-quoting Roberts, 448 U.S. at 66.)

In Bockting vs Bayer (2005 DJDAR 2061), the Court held that Roberts rests on evidentiary principles of reliability and trustworthiness rather than on the Constitutional principle of Confrontation (at 2062). Furthermore, the Bockting Court held that the Crawford majority quite clearly states that the Roberts "test departs from the historical principles, in that it is both 'too broad' and 'too narrow'". Crawford, 124 S.Ct. at 1369(Id. at 2062).

Crawford did not announce the same rule as Roberts. Whereas Roberts countenanced the admission of witness testimony if trust-worty under Crawford, the testimony is admitted only if the witnesses are subject to cross examination. The Court concluded that the cases

GROUND ONE

ARGUMENT ONE, Cont.

applying Roberts have "remained faithful to the framer's understanding (Crawford id. at 1369), that testimonial statements are admissible only when two criterias are met: unavailability and opportunity for cross examination". In other words,"[W]here testimonial statements are at issue, the only indicum of reliability sufficient to satisfy Constitutional demands is the one the Constitution actually prescribes: confrontation (Crawford Id. at 1374). The dissent in Crawford mirrors this view by concluding that "the Court of course overrules Ohio vs Roberts", id. at. 1378, and criticizing the Courts adoption of a new interpretation of the confrontation clause..." id at 1374.

Indeed, cross-examination is a tool used to flesh out the truth, not an empty procedure (Crawford vs Washington, 124 S.Ct. 1374. See Kentuky v Stincer, 482 U.S. 730 (1987)(The Right to Cross-examine, protected by the confrontation clause, thus it is essentially a functional right designed to promote reliability in the truth finding functions of a criminal trial".) See also: Maryland vs Craig, 497 U.S. 836 (1990)(The central concern of the confrontation clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of facts.").

The fact that the Court, in the instant case, allowed incriminating evidence in the form of prior preliminary hearing testimony and statements made to the police by Kevin and Lucille Thomas that they did not have to testify in trial; that was testified to by investigators, the petitioner was unable to cross-examine and confront. Again, the Supreme Court has excluded testimony, even if the defendant had

GROUND ONE

ARGUMENT ONE, Cont.

adequate opportunity to cross-examine, where the Government failed to establish the unavailability of the witnesses. In the instant case, the trial court denies that the witnesses were legally unavailable. Because of this, the evidence admitted (their preliminary hearing testimony and their police statements)was admitted in violation of the petitioner's Sixth Amendment Right to confrontation; since both witnesses were dismissed after the 402 in limine hearing, were they claimed no recollection of their prior testimony and police statements. The witnesses were dismissed, but their prior statements were presented to the jury through police investigators.

Furthermore, the Crawford Court turned to the history of the confrontation clause to resolve the issue, and held: (a)"...that history supports two principles. First, the principle evil at which the clause was directed was the civil-law mode of criminal procedure, particularly the use of ex parte examinations as evidence against the accused. The clause's primary object is testimonial hearsay, and interrogations by law enforcement officers fall sqarely within that class. Second, the framers would not have allowed admission of testimonial statements of a witness who did not appear at trial, unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination." Again, the witnesses in the instant case were not deemed unavailable. Thus, their prior testimony and police statements should not have been admitted into evidence, unless they were unavailable to testify. By admitting the evidence without the witnesses, the trial court conducted an ex parte examination and used it as evidence against the accused. The very principle evil at which the clause

GROUND ONE
ARGUMENT ONE, Cont.

was directed to prevent.

Continuing in Crawford, the court held,"(d) The confrontation clause commands that the reliability be assessed in a particular manner: By testing in the crucible of cross-examination..."(Id. at 1356).

The Supreme Court, in Mattox vs United States,156 U.S. 237 (1895), allowed the admission of ex parte preliminary hearing testimony in trial if the defendant had an adequate opportunity to cross-examine, the Crawford court, however, held (at 1367-68) that "even where defendant had such opportunity, we exclude the testimony where the Government had not established unavailability of the witnesses. See: Barber vs Page, 390 U.S. 719, 722-725 (1968); cf. Motes vs United States, 178 U.S. 458, 470-471 (1900). In the instant case, the State admitted that the witnesses were not unavailable. And the trial court still presented the evidence through investigator testimony, denying the petitioner the opportunity to adequately cross-examine.

In addition, in the Crawford case (Id. at. 1370) the court held that "admitting statements deemed reliable by a judge is fundamentally at odds with the Right to confrontation. To be sure, the clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination...dispensing with the confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. this is not what the Sixth Amendment prescribes...The Constitution prescribes a procedure for determining the reliability

GROUND ONE

ARGUMENT ONE, Cont.

of testimony in criminal trials, and we, no less than the State Courts, lack authority to replace it with one of our own devising."

It is obvious that the trial court was not satisfied with both Kevin and Lucille Thomas' testimony in limine, during trial. And since they both claimed no recollection of their prior testimony and statements to the police, the trial court made its own decision that the prior testimony and statements to the police were reliable, and therefore admitted them into evidence through the police investigators. In doing so, the trial court replaced confrontation, which is prescribed by the Constitution, with a procedure of its own devising, resulting in the petitioner's wrongful conviction and "life" sentence.

In Gill vs Ayers (9th Cir. 2003) 342 F.3d. 911, at 921, the Court held that a trial-type error of constitutional dimensions is harmless unless it had a substantial and injurious effect..." Brecht vs Abrahamson, 507 U.S. 619,637; 113 S.Ct. 1710; 123 L.Ed.2d. 353 (1993) quoting Kotteakos vs United States, 328 U.S. 750; 66 S.Ct. 1239; 90 L.Ed. 1557 (1946).

Continuing in Kotteakos, the court held that "the injury cannot be merely whether there was enough to support the result, apart from the phase effected by the error. It is rather, even so, whether the error itself has substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand (at 328 U.S. at 765). In the instant case, because of the incriminating nature of Kevin and Lucille Thomas' preliminary hearing testimony and police statements, there can be no doubt that the jury relied wholly upon that evidence, and the petitioner was convicted of murder and sentenced to "life" in

GROUND ONE

ARGUMENT ONE,Cont.

prison. It is indisputable that the violation of the petitioner's Right to confrontation was substantial and injurious. The error held substantial influence in the petitioner's criminal conviction.

In People vs Song (2004), 22 Cal Rptr. 3d. 118,127, the court declared that "under the Chapman test, Arande-Burton error is harmless where the properly admitted evidence against the defendant is overwhelming and the improperly admitted evidence is merely culmative. (Harrington vs California (1969) 395 U.S. 250,254; 89 S.Ct.1726; 23 L.Ed. 2d. 284,287). To find the error harmless we must find beyond a reasonable doubt that it did not contribute to the verdict, that it was unimportant in relation to everything else the jury considered on the issue in question(Yates vs Evatt (1991) 500 U.S. 391, 111 S.Ct. 1884; 114 L.Ed. 2d. 432, 448, diapproved on another point in Estelle vs McGuire (1991) 502 U.S. 62,72, fn 4, 112 S.Ct. 475, 482 fn 4, 116 L.Ed. 2d. 385, 399 fn 4). We employ the same analysis for Crawford error, since the Chapman test also applies.

In the instant case, the evidence improperly admitted was not merely cumlative, but rather overwhelming. Thus the error was by no means harmless. No trier of facts could reasonably doubt that the improperly admitted evidence contributed greatly to the verdict in the petitioner's case.

Based on the new rule announced in the Crawford case, the petitioner's conviction must be reversed. In Bockting vs Bayer (2005) DJDAR,2061, the Ninth Circuit Court of Appeals held that new rules apply retroactively only where they place "certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority

GROUND ONE

ARGUMENT ONE, Cont.

to proscribe," or where the new rule is implicit in the concept of ordered liberty. Teague vs Lane, 489 U.S. 288,307(1989). The latter category is reserved for watershed rules of criminal procedures." Id. at 311. The guidance of Teague leads to the conclusion that crawford announces a "new rule". Because the Crawford rule is both a "watershed Rule" and one "without which the likelihood of accurate conviction is seriously diminished." Summerlin, 124 S.Ct. at 2523, the rule is retroactive.

CONCLUSION

In conclusion, petitioner contends that the trial court violated his Sixth Amendment Right to confrontation, by failing to exclude preliminary hearing testimony and statements to the police by Kevin and Lucille Thomas from the trial; that the trial court violated the confrontation clause by allowing ex parte testimony concerning key witnesses; that this error was not harmless; and that the error caused the petitioner to suffer substantial and injurious effects at the trial, thus making the trial fundamentally unfair, in violation of his Sixth Amendment Right to a fair trial, and his fourteenth Amendment Right to Due Process of Law.

Based on the foregoing, petitioner requests that this court reverse his conviction, vacate his sentence, and remand him back to the Superior Court for a new trial, excluding both the preliminary hearing testimony and the statements given to the police by Kevin and Lucille Thomas, as well as any additional relief the court deems appropriate.

Dated: OCT. 14, 2007

Respectfully Submitted,

Freddie L. Doss

(b) GROUND TWO: ______________________________

Supporting FACTS (state *briefly* without citing cases or law): ______________________________

Did you raise GROUND TWO in the California Supreme Court?

☐ Yes ☐ No.

(c) GROUND THREE: ______________________________

Supporting FACTS (state *briefly* without citing cases or law): ______________________________

Did you raise GROUND THREE in the California Supreme Court?

☐ Yes ☐ No.

(d) GROUND FOUR: ____

Supporting FACTS (state *briefly* without citing cases or law): ________________

Did you raise GROUND FOUR in the California Supreme Court?

☐ Yes ☐ No.

23. Do you have any petition or appeal now pending in any court, either state or federal, pertaining to the judgment under attack?
☐ Yes ☒ No

24. If your answer to #23 is "Yes," give the following information:
(a) Name of Court: ______
(b) Case Number: ______
(c) Date action filed: ______
(d) Nature of proceeding: ______
(e) Grounds raised: ______
(f) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☒ No

25. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
(a) At preliminary hearing: ______
(b) At arraignment and plea: ______
(c) At trial: ______
(d) At sentencing: ______
(e) On appeal: ______
(f) In any post-conviction proceeding: ______
(g) On appeal from any adverse ruling in a post-conviction proceeding: ______

26. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
☒ Yes ☐ No

27. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
☐ Yes ☒ No

(a) If so, give name and location of court that imposed sentence to be served in the future:

(b) Give date and length of the future sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
☐ Yes ☐ No

28. Date you are mailing (or handing to a correctional officer) this Petition to this court:
October 14, 2007

Wherefore, Petitioner prays that the Court grant Petitioner relief to which he may be entitled in this proceeding.

SIGNATURE OF ATTORNEY (IF ANY)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

October 14, 2007 (DATE)

Freddie J. Doss
SIGNATURE OF PETITIONER

EXHIBIT "A"

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ERNEST SIMMS et al., Defendants and Appellants.	B074209 (Super. Ct. No. BA050222) COURT OF APPEAL - SECOND DIST. FILED JAN 11 1996 JOSEPH A. LANE Clerk Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Sam Cianchetti, Judge. Affirmed.

Thomas F. Coleman, Janyce Keiko Imata Blair, David H. Goodwin, Debra R. Huston, under appointment by the Court of Appeal, for Defendants and Appellants.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, and Sally P. Brajevich, Deputy Attorney General, for Plaintiff and Respondent.

Appellants Ernest Simms, Clifford R. Jenkins, Brian T. Hill, and Freddie L. Doss, appeal from their judgments of conviction following a joint jury trial.[1] In the information, appellants and former codefendants, Tyrone Carl Finley and Steven Eric Taylor, were charged with multiple felonies arising from two separate incidents. Counts I through VI related to the Burge/Thomas incident which occurred on February 22, 1990. Counts VII through X related to the Hernandez/Zelaya incident which occurred on February 16, 1990. Count XI, which charged appellant Jenkins with the crime of possession of a firearm by a convicted felon, was bifurcated and tried before the court.

The prosecution dismissed all charges against former codefendant Tyrone Carl Finley. The jury ultimately acquitted former codefendant Steven Eric Taylor of all charges and acquitted all appellants of counts VII through X which were related to the February 16, 1990, Hernandez/Zelaya incident.

Appellants were convicted of the following charges. Count I, the murder of Randy Burge (Pen. Code, § 187, subd. (a)).[2] (The jury found true the special circumstances allegations that appellants Doss and Hill committed the Burge murder during the commission of a robbery (§ 190.2, subd. (a)(17)) and a kidnapping (§ 190.2, subd. (a)(17)). The trial court later struck those special circumstance findings.) Count II, the kidnapping for robbery of Burge (§ 209, subd. (b)). Count III, the kidnapping for ransom of Thomas (§ 209, subd. (a)). Count IV, the conspiracy to commit the crime of kidnapping for ransom of Thomas (§§ 182/209, subd. (a)). The jury found five of the alleged overt acts to be true. Count V, the robbery of Thomas (§ 211, subd. (a)). Count VI, the attempted willful, deliberate and premeditated murder of Thomas (§§ 664/187, subd. (a)). The jury found true the use of a firearm enhancement (§ 12022.5, subd. (a)) alleged against each appellant in counts I through VI.

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[1] Unless otherwise indicated, "appellants" refers to all four appellants.

[2] Unless otherwise indicated, all further statutory references are to the Penal Code.

In a bifurcated court trial, appellant Jenkins was found guilty of possession of a firearm by a convicted felon (§ 12021.1). The court also found true Jenkins' three alleged prison priors (§ 667.5, subd. (b)).

Probation was denied. Appellants were each sentenced to 25 years to life for the murder of Burge (count I, § 187, subd. (a)), plus a consecutive enhancement of 4 years for the personal use of a firearm (§ 12022.5, subd. (a)) for a principal term of 29 years to life. The court sentenced appellants to a subordinate consecutive life with parole term for the attempted willful, deliberate and premeditated murder of Thomas (§§ 664/187, subd. (a)). In addition, each appellant was sentenced to life with the possibility of parole terms for the two kidnapping charges (§ 209, subds. (a) & (b)) as well as the conspiracy to commit kidnapping charge (§§ 182/209, subd. (a)), which were stayed pursuant to section 654. Appellant Jenkins was sentenced to an additional term of two years for the felon in possession of a firearm charge (§ 12021.1) to be served concurrently with the other counts. The court struck Jenkins' three prison prior convictions (§ 667.5, subd. (b)) in the interests of justice (§ 1385).

Appellants were given appropriate credits for presentence custody. They have filed timely notices of appeal.

I

FACTS

On February 22, 1990, at approximately 2 p.m., Kevin Thomas was driving his car at the intersection of 67th Street and Vermont Avenue in Los Angeles. Thomas was en route to 69th Street to purchase marijuana.[3] While he was stopped in traffic waiting for other cars, Thomas noticed appellant Simms standing in the middle of the street.

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[3] Since appellants were acquitted of counts VII through X, we will not describe the facts relating to the Hernandez/Zelaya incident except where relevant to the issues on appeal.

Appellant Simms approached Thomas and placed a .25 or .32 caliber revolver to the back of Thomas's head and ordered him out of the car. Thomas exited his car and heard it being driven away. Simms escorted Thomas at gunpoint up the driveway of a nearby home located at 1042 West 67th Street. Appellant Jenkins was standing at the back door of the home and similarly placed a .25 or .32 caliber revolver to Mr. Thomas's head. When Thomas asked why they were doing this, appellant Simms replied that Bruce, a rival drug dealer, told them to do it and that "Bruce wants to talk to you."

Appellant Simms escorted Thomas to the living room and ordered him to lie on the floor. Appellant Jenkins placed his knee in Thomas's back and handcuffed him while appellant Simms held Thomas at gunpoint. Appellant Jenkins said, "This is for when I seen you the other day and you pointed your finger at me." Appellant Jenkins wrapped tape around Thomas's mouth, placed him on the couch, and left the house. Moments later, appellant Jenkins returned holding Randy Burge at gunpoint. It should be noted that victim Thomas and victim Burge were friends and each of them knew appellant Simms. Thomas recalled seeing Burge on the corner of 67th and Kansas, two houses away from where Thomas was taken from his car at gunpoint. Burge had seen what had happened to Thomas. Appellant Simms said to Burge, "You at the wrong place and you at the wrong place at the wrong time."

Appellants Hill and Doss entered the house together carrying guns. Hill had a .25 or .32 caliber revolver. Hill said, "Yeah, we got you." Appellant Jenkins told Thomas that they were going to wait until Bruce came or, in the alternative, they would let Thomas go if he gave them $10,000. Appellants Simms and Jenkins both placed guns to Thomas's head and directed him to call his mother, Lucille Thomas. Thomas's handcuffs were removed to permit him to dial the telephone. They told Thomas that they were going to send a girl to his mother's house to pick up the money and to go get some "works" with it. "Works" means "dope."

Mr. Thomas placed the call to his mother per appellant Simms's and Jenkins' instructions. Appellant Jenkins wrote Lucille Thomas's address on a piece of paper. Mrs. Thomas put together the $10,000. At approximately 5:45 to 6:00 p.m., a Black female in her twenties came to Mrs. Thomas's house and asked Mrs. Thomas if she had received a phone call. The woman demanded and received the money and walked towards a burgundy van parked across the street.

Meanwhile, appellant Jenkins took Thomas's ring, his keys and approximately $30. Jenkins forced Thomas to lie down and handcuffed him again. Appellants Hill and Doss were also present. At that time, Doss was holding a .38 caliber revolver. Apparently, Mr. Burge began questioning appellants why they were doing this to him. Appellant Simms walked up to Mr. Burge, pointed his gun at him and told Burge to "Shut up." When victim Burge continued, appellant Simms said, "Shut up. We're not playing. Keep the noise down." When victim Burge persisted in questioning appellant Simms further, Simms shot Burge in the foot. Mr. Burge then began "hollering." Appellant Simms taped Burge's mouth shut, but later removed the tape and placed a white shirt in his mouth. When that didn't stop Burge from "hollering" and mumbling, Simms removed the shirt and placed extra tape on Burge's mouth.

Approximately two hours later, appellants Simms and Jenkins returned to the house. Thomas asked them if they had obtained the money. Simms replied, "No, we didn't get that and your mama don't care about you." Appellants Simms and Jenkins left the house again. Appellants Hill and Doss remained in the house holding Burge and Thomas at gunpoint. At this time, Thomas was handcuffed and his mouth was taped as he sat on the couch. Thomas knew he was going to be killed. His only chance to survive was to escape. Thomas bolted from the couch and threw his body sideways through a closed glass window. He landed on his back in the driveway five feet below. The handcuffs broke in the middle. Thomas ran down the street with appellants Doss and Hill in pursuit shooting at Thomas at least eight to ten times. Thomas sought help at two apartment complexes, but no one would open their doors. Eventually, Thomas entered the "Bottoms Up" liquor store at 67th and Vermont where employee Van Phipps called the police. One of Thomas's hands was handcuffed and he was scared.

When Los Angeles police officers arrived a short time later, they noticed that Thomas was very scared, he was perspiring, he appeared to be in shock and he feared for his life. Thomas stuttered and was unable to get his words out. Officers recovered a strip of duct tape from the floor of the store as well as the handcuffs. Thomas related to them what had happened to him and directed them back to the location where he had been detained at 1042 West 67th Street. At approximately 9:44 p.m., as they were driving around the perimeter of the house, officers saw a burgundy van at 68th and Vermont. Thomas saw appellants Simms and Jenkins inside the van and said, "That's them right there. Those are the dudes that did it." The police car made a U-turn and proceeded to follow the van. The van fled screeching its tires and pulled into a driveway at 1007 West 68th Street. Appellant Simms exited the driver's side. Appellant Jenkins exited the passenger's side. Both men refused to comply with the officers' orders and fled. Simms was captured a short time later hiding in a different van parked in the middle of the block on 68th Street. Appellant Jenkins was found inside the residence of Inez Simms, appellant Simms's mother, at 1016 West 67th Street, wearing only his underwear. Two handcuff keys were recovered from the toilet bowl in the restroom at this location.

A subsequent search of the crime scene at 1042 West 67th Street led to the discovery of a roll of gray duct tape in the living room similar to the strip found at "Bottoms Up" liquor store. Two strips of duct tape were found on the living room floor. Marijuana was found inside the residence. A torn sheet of paper containing victim Thomas's address and house color was found inside the home.

Forensic testing revealed appellant Simms's fingerprints on the roll of duct tape as well as on several baggies of marijuana. The handwriting on the note containing Thomas's address was determined to be written by appellant Jenkins.

On February 22, 1990, at approximately 9 p.m., witness David Diaz heard a single gunshot coming from the playground area of Centinela Park, located in the city of Inglewood, approximately 3.9 miles from the home where Burge and Thomas had been held. The following morning, at approximately 6:35 a.m., a jogger discovered Burge's body in Centinela Park, face down. Burge's hands were handcuffed behind his back. He had a white towel wrapped around his neck. He had a rolled-up white tee-shirt around his face as a gag. He had been fatally shot behind the ear. A pool of blood was located on the ground below him and on the right side of his face, but no other blood was located in the area. The autopsy revealed that the fatal shot, a contact wound, was fired from a .38 caliber revolver. Burge also suffered a gunshot wound to the foot which was subsequently determined to be fired from a .22 caliber handgun. The coroner estimated the time of death between 8 and 9 p.m. on February 22, 1990.

On February 27, 1990, detectives showed Thomas a series of photographs which included Doss and Hill. Thomas identified appellants Doss and Hill. On the backs of the individual photographs, Thomas wrote that Doss and Hill held the guns on Thomas and Burge when Jenkins and Simms came and left the house; that Doss had put tape on Burge; and that Doss and Hill had shot at him when he was running away. Thomas further related that he knew all of the appellants because they had grown up together and went to school together. Although he did not recall the names of Hill and Doss, he could find out, because he knew them.

Appellant Simms's sister, Glenda Ramsey, rented the burgundy van on February 2, 1990. On February 22, 1990, at approximately 4 p.m., she loaned it to appellant Simms and his friends.

Prior to trial, appellant Jenkins contacted Thomas, who was also in custody on an unrelated robbery charge, and offered to pay him $5,000 to say his preliminary hearing testimony was a lie. This statement was admitted only against Jenkins.

II

CONTENTIONS

Appellants contend: I. [Doss only] The trial court improperly denied appellant Doss's motion to sever counts I through VI, concerning victims Kevin Thomas and Randy Burge, from counts VII through X, concerning the murder of Felipe Hernandez. II. The trial court erred by permitting the prior statements of Kevin and Lucille Thomas to be admitted into evidence. III. The trial court abused its discretion by preventing defense counsel from attempting to impeach Mr. Thomas, the victim, with evidence of two prior misdemeanor convictions for receiving stolen property and carrying a concealed weapon. IV. [Hill only] The trial court erred by permitting the jury to have trial testimony read back without appellant Hill's waiver of the right to be present during read back. V. The prosecutor committed misconduct. VI. The trial court erred by failing to instruct the jury *sua sponte* that an unconfirmed extrajudicial statement was insufficient evidence to support appellants' convictions for the attempted murder of Mr. Thomas. VII. The trial court erred by failing to instruct the jury as to second degree felony murder. VIII. The trial court erred by failing to instruct the jury as to second degree murder based upon an aiding and abetting theory. IX. The trial court erred by failing to instruct the jury on the lesser included offense of kidnapping. X. The trial court erred by failing to instruct the jury *sua sponte* on the lesser included offense of false imprisonment. XI. The trial court erred by instructing the jury that it could infer a consciousness of guilt based upon appellants' flight under CALJIC No. 2.52. XII. Appellants were improperly convicted of the murder of Randy Burge based on the felony murder theory. XIII. There was insufficient evidence to support appellants' convictions for the attempted premeditated and deliberate murder of Kevin Thomas. XIV. The jury's finding of not true as to overt act No. 14, that appellants Hill and Doss fired shots at Mr. Thomas, constituted an inconsistent verdict. XV. The evidence was insufficient to sustain appellants' convictions for personally using a firearm in the murder of Randy of Randy Burge. XVI. Appellants' convictions must be reversed based upon the cumulative errors at trial.

III

DISCUSSION

A. *Pretrial Issue*

1. *Doss's motion to sever counts I through VI from VII through X.*

Appellant Doss argues that the trial court's failure to sever the Thomas/Burge incident, counts I through VI, from the Zelaya/Hernandez incident, counts VII through XI, constituted reversible error. The other appellants are not entitled to raise this contention since they failed to join in the motion below. (*People* v. *Miranda* (1987) 44 Cal.3d 57, 78.)

Section 954 establishes a legislative preference for joinder of crimes which are of the same class or which possess common attributes.[4] (*People* v. *Leney* (1989) 213 Cal.App.3d 265, 269.) There is no question that the crimes charged in the Thomas/Burge incident, namely murder, robbery, conspiracy and kidnapping, are of the same class of crimes as those charged in the Zelaya/Hernandez incident, namely murder, robbery and conspiracy. However, even where crimes are of the same class, joinder may be prohibited when the defendant can demonstrate an "extreme disparity between weak and strong cases, or between inflammatory and non-inflammatory offenses, in order to demonstrate the potential for prejudicial 'spill-over' from one case to the other . . . ." (*Belton* v. *Superior Court* (1993) 19 Cal.App.4th 1279, 1284.) Section 954 grants the court discretion to sever the two sets of counts so that they might be tried separately " ' "in the interest of justice and for good cause shown.". . . 'Refusal of severance may be prejudicial if discretion is abused.' [Citation.]' " (*Williams* v. *Superior Court* (1984) 36 Cal.3d 441, 447.) Appellant carries the burden of "clearly showing potential prejudice." (*Frank* v. *Superior Court* (1989) 48 Cal.3d 632, 640.)

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[4] Section 954 provides as follows: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count."

Doss contends that a "spill-over effect" occurred because the Hernandez/Zelaya incident involved a brutal incident in which Hernandez, a drug dealer, was beaten to death with a baseball bat and marijuana was stolen, and "weaknesses in the Burge/Thomas case were shored up by trying the Hernandez case with it." This contention lacks merit.

There were a number of common factors in the Thomas/Burge and Hernandez/Zelaya incidents: both offenses occurred in the same vicinity; both were drug related; many of the same alleged perpetrators were involved; guns were used to intimidate the victims before each of the murders; the murders were brutal. While it may be true that all of the evidence may not have been cross-admissible, the absence of cross-admissibility does not preclude joinder. (*Belton* v. *Superior Court, supra,* 19 Cal.App.4th at p. 1286.) The trial court's decision to deny the motion for severance must be upheld on appeal, absent an abuse of discretion. (*Id.* at p. 1285.) The trial court did not abuse its discretion in this case.

Appellant Doss has failed to carry his burden of establishing prejudice. The jury was unimpressed with the prosecution evidence of the Hernandez murder in which identity was a pivotal issue. It acquitted all appellants of those offenses. Consequently, this offense could not have "shore[d] up the weaknesses in the Burge/Thomas case" and the photographic "slide show" evidence depicting the gruesome crime scene photos could not have caused the jury to rush headlong to the conclusion appellant was likely to have committed or been involved in the violent acts. The fact that the jury was able to acquit on some charges "demonstrates that the jury was able to view and evaluate the evidence on each charge separately." (*People* v. *Miranda, supra,* 44 Cal.3d 57, 78.)

B. *Trial Issues*

2. *Introduction of the prior statements of Kevin and Lucille Thomas.*

Appellants claim that the trial court committed reversible error when it admitted the prior statements of victim Kevin Thomas and his mother, witness Lucille Thomas, who each testified at trial that they had no memory whatsoever of the incident or their previous testimony at the preliminary hearing. Appellants complain that the prosecution violated their rights to confrontation and cross-examination by failing to establish the witness's unavailability. They further assert that the statements were not properly admissible under the prior inconsistent statement exception to the hearsay rule. (Evid. Code § 1200, subd. (a).)

a. *Confrontation*

The Sixth Amendment confrontation clause to the United States Constitution, made applicable to the states through the Fourteenth Amendment (*Pointer* v. *State of Texas* (1965) 380 U.S. 400, 403-405) provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him [or her]." Appellants acknowledge that there are two exceptions to the confrontation clause's preference for contemporaneous cross-examination, namely, prior sworn testimony where the witness is legally unavailable, and prior inconsistent statements.

i. *Unavailability*

Lucille and Kevin Thomas each testified at trial and claimed a lack of recall. They did not refuse to testify. As such, they were not legally unavailable under Evidence Code

§ 240, subdivision (a)(3). While we recognize that in certain circumstances a witness can be deemed to be unavailable where the witness has a bona fide lack of memory through illness or infirmity, such is not the case here. (See *People* v. *Alcala* (1992) 4 Cal.4th 742, 774-780 [Witness was legally unavailable within the meaning of Evid. Code, § 240, subd. (a)(3) where she was not feigning a lack of recollection, which had been existing for over a year and was connected with a stress-related disability] and *People* v. *Sul* (1981) 122 Cal.App.3d 355, [Witness who was unwilling to testify, was not legally unavailable within the meaning of Evid. Code, § 240, subd. (a)(3) since the trial court failed to take reasonable steps to induce the witness to testify and it was not apparent that such steps would have been unavailing].)

*Appellants' assertions that the trial court was required to take coercive action, such as threatening the witnesses with contempt and imprisonment, or prosecution for perjury, is unavailing. We have grave concerns with the use of the court's contempt powers to insure that a witness testifies to a state of events that a defendant or a trial judge "subjectively" feels is truthful. We categorically reject appellants' attempts to blur the distinction between an unavailable witness, who for instance is present and objectively refuses to testify, with a witness who testifies to an incredible failure of recollection. The proper procedure is described *infra*, as an implied denial, which qualifies as a prior inconsistent statement.

ii. Prior inconsistent statement.

Appellants next argue that the trial court erred in admitting the Thomases' statements, namely, their prior preliminary hearing testimony and the surreptitiously recorded videotape of the Kevin Thomas interview, exhibit number 88, as "implied prior inconsistent statements."

In an Evidence Code section 402 motion in limine, Kevin Thomas denied the entire sequence of events, which he had previously described to the police, ever occurred. Mr. Thomas did not recall a person, known to him as Ernest Simms or "Pook," approaching the driver's side of his car and placing a gun to his head. He did not recall being taken to the location where he was held hostage. He did not recall being interviewed by the police or being videotaped. He did not recall testifying at the preliminary hearing and he did not feel that reviewing the preliminary hearing transcript or videotape would refresh his memory. Appellants were provided an opportunity to cross-examine Kevin Thomas, but declined to do so. The trial judge made findings of fact supporting its decision that the witness's "lack of memory" was contrived. The trial court asked Kevin Thomas if it was correct he had no memory of the events of February 22, 1990, or anything which occurred afterwards. Thomas confirmed that was the case. The trial court then excused the witness, subject to recall. Prior to his trial testimony claiming a total lack of recollection, Kevin Thomas told an investigator that he was upset that the prosecution had not done anything to assist him with his own assault case in which he was sentenced to nine years in state prison. Thomas told the investigator he was concerned for his safety if he testified in the instant proceedings and that he would refuse to testify. Thomas said if he was forced to testify, he would perjure himself. The trial court permitted the introduction of the videotape as well as the reading of portions of Kevin Thomas's preliminary hearing testimony.

Mrs. Lucille Thomas testified out of the presence of the jury in a motion in limine pursuant to Evidence Code section 402 motion. When she was questioned as to her recollection of the events of February 22, 1990, she repeatedly claimed to have no recollection of the events of that night. She further indicated that she did not recall testifying at the preliminary hearing nor did she recall giving a statement to detectives. In the jury's presence, Lucille Thomas reiterated her lack of recollection of the events of that night, her preliminary hearing testimony or her interviews with police. At that point, appellants' counsel and the prosecutor entered into a stipulation that Lucille Thomas did not remember any of the testimony of the preliminary hearing. Although appellants were provided with the opportunity to cross-examine Ms. Thomas, all four declined to ask the witness any further questions. The trial court made findings of fact that Ms. Thomas was reluctant to testify; that he did not believe she had no memory of those events; and that her testimony that she could not recall was the equivalent of a denial that she made the statement. The trial court permitted an investigator to testify to Lucille Thomas's prior inconsistent statements and admitted portions of her preliminary hearing testimony.

Appellants contention that these statements were inadmissible under the prior inconsistent statement exception to the hearsay rule, Evidence Code section 1235, is without merit. In *People* v. *O'Quinn* (1980) 109 Cal.App.3d 219, 225, Division 5 of this District held that a witness's prior statements are admissible as long as there is a reasonable basis in the record for concluding that the witness's "I don't remember" responses are evasive and untruthful.

"The fundamental requirement for admissibility of a prior statement of a witness, whether used to attack credibility or to prove the truth of the facts asserted in the statement, is that the out of court statement be inconsistent with some portion of the witness's current testimony. In *People* v. *Green* (1971) 3 Cal.3d 981 [92 Cal.Rptr. 494, 479 P.2d 998], our Supreme Court dealt with the issue of whether prior statements could be introduced when the witnesses' in-court testimony consists primarily of evasive answers and lapses of memory. The court concluded that '[i]nconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement [citation].' " (*People* v. *Plasencia* (1985) 168 Cal.App.3d 546, 551; see also *People* v. *Hawthorne* (1992) 4 Cal.4th 43, 55, fn.4; *People* v. *Montiel* (1993) 5 Cal.4th 877, 930.) There is no merit to appellants' contention that the witnesses' patently evasive "global amnesia" regarding these events were not prior inconsistent statements. The trial court properly admitted the statements as implied prior inconsistent statements.

JS44

(Rev. 07/89)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

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IFP MOTION FILED
Yes ___ No ___
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SOUTHERN DISTRICT OF CALIFORNIA
BY: ___ DEPUTY

I (a) PLAINTIFFS

Freddie L. Doss

DEFENDANTS

M. Evans

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Kings
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

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H-74204

ATTORNEYS (IF KNOWN)

'07CV 2011 DMS RBB

II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY)

☐ 1 U.S. Government Plaintiff
☒ 3 Federal Question (U.S. Government Not a Party)
☐ 2 U.S. Government Defendant
☐ 4 Diversity (Indicate Citizenship of Parties in Item III

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT (For Diversity Cases Only)

	PT	DEF		PT	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business in This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

28 U.S.C. 2254

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

CONTRACT
☐ 110 Insurance
☐ Marine
☐ Miller Act
☐ Negotiable Instrument
☐ 150 Recovery of Overpayment &Enforcement of Judgment
☐ 151 Medicare Act
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
☐ 153Recovery of Overpayment of Veterans Benefits
☐ 160 Stockholders Suits
☐ Other Contract
☐ 195 Contract Product Liability

REAL PROPERTY
☐ 210 Land Condemnation
☐ 220 Foreclosure
☐ 230 Rent Lease & Ejectmant
☐ 240 Tort to Land
☐ 245 Tort Product Liability
☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
☐ 310 Airplane
☐ 315 Airplane Product Liability
☐ 320 Assault, Libel & Slander
☐ 330 Federal Employers' Liability
☐ 340 Marine
☐ 345 Marine Product Liability
☐ 350 Motor Vehicle
☐ 355 Motor Vehicle Product Liability
☐ 360 Other Personal Injury

PERSONAL INJURY
☐ 362 Personal Injury- Medical Malpractice
☐ 365 Personal Injury - Product Liability
☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
☐ 370 Other Fraud
☐ 371 Truth in Lending
☐ 380 Other Personal Property Damage
☐ 385 Property Damage Product Liability

CIVIL RIGHTS
☐ 441 Voting
☐ 442 Employment
☐ 443 Housing/Accommodations
☐ 444 Welfare
☐ 440 Other Civil Rights

PRISONER PETITIONS
☐ 510 Motions to Vacate Sentence Habeas Corpus
☒ 530 General
☐ 535 Death Penalty
☐ 540 Mandamus & Other
☐ 550 Civil Rights

FORFEITURE/PENALTY
☐ 610 Agriculture
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☐ 625 Drug Related Seizure of Property 21 USC881
☐ 630 Liquor Laws
☐ 640 RR & Truck
☐ 650 Airline Regs
☐ 660 Occupational Safety/Health
☐ 690 Other

LABOR
☐ 710Fair Labor Standards Act
720 Labor/Mgmt. Relations
☐ 730 Labor/Mgmt. Reporting & Disclosure Act
☐ 740 Railway Labor Act
☐ 790 Other Labor Litigation
☐ 791 Empl. Ret. Inc.
☐ Security Act

BANKRUPTCY
☐ 422 Appeal 28 USC 158
☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
☐ 820 Copyrights
☐ 830 Patent
☐ 840 Trademark

SOCIAL SECURITY
☐ 861 HIA (13958)
☐ 862 Black Lung (923)
☐ 863 DIWC/DIWW (405(g))
☐ 864 SSID Title XVI
☐ 865 RSI (405(g))

FEDERAL TAX SUITS
☐ 870 Taxes (U.S. Plaintiff or Defendant)
☐ 871 IRS - Third Party 26 USC 7609

OTHER STATUTES
☐ 400 State Reappointment
☐ 410 Antitrust
☐ 430 Banks and Banking
☐ 450 Commerce/ICC Rates/etc.
☐ 460 Deportation
☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 810 Selective Service
☐ 850 Securities/Commodities Exchange
☐ 875 Customer Challenge 12 USC
☐ 891 Agricultural Acts
☐ 892 Economic Stabilization Act
☐ 893 Environmental Matters
☐ 894 Energy Allocation Act
☐ 895 Freedom of Information Act
☐ 900 Appeal of Fee Determination Under Equal Access to Justice
☐ 950 Constitutionality of State
☐ 890 Other Statutory Actions

VI. ORIGIN (PLACE AN X IN ONE BOX ONLY)

☒ 1 Original Proceeding ☐ 2 Removal from State Court ☐ 3 Remanded from Appelate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23 DEMAND $ Check YES only if demanded in complaint: JURY DEMAND: ☐ YES ☐ NO

VIII. RELATED CASE(S) IF ANY (See Instructions): JUDGE Docket Number

DATE October 17, 2007 ~~SIGNATURE OF ATTORNEY OF RECORD~~

[signature]